In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1480

FERRIS JACOB ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts charging him with transporting obscene material in interstate commerce for the purpose of sale and distribution, in violation of 18 U.S.C. 1465, and on one count charging him with conspiring to do so, in violation of 18 U.S.C. 371. He was sentenced to three concurrent terms of imprisonment of eighteen months and fined $20,000.

The Court of Appeals for the Second Circuit affirmed the conviction on July 7, 1971 (*United States* v. *Manarite, et al.*, 448 F.2d 583), and, on November 9, 1971, this Court denied a petitioned for a writ of certiorari (404 U.S. 947).

Following incarceration on January 4, 1972, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence on the ground that one of his two retained trial attorneys had a conflict of interest. On February 14, 1972, the trial judge denied the motion without a hearing on the ground that the claim was refuted by the files and records of this case (App. 25-26).[1] On April 14, 1972, the court of appeals affirmed without an opinion (App. 26).

Petitioner's basic contention is that he was denied the effective representation of counsel because prior to trial one of his attorneys had represented co-defendants.

At trial petitioner was represented by two retained attorneys, Robert J. Milavetz, petitioner's attorney throughout these proceedings, and Harold Price Fahringer. Initially, Mr. Fahringer filed an appearance for co-defendants Bornstein and Wolf. In the pre-trial proceedings, Mr. Fahringer also filed motions for petitioner and his brother, but acting only as local counsel (App. 10). At that time, Mr. Fahringer also told the trial court that he was representing Bornstein only on the motions and had advised him to secure separate trial counsel (*ibid.*), which

[1] "App." refers to the Appendix which petitioner has filed in this Court.

Mr. Bornstein did (App. 11). Subsequently, on September 26, 1970, Mr. Fahringer wrote the trial judge reminding him that he no longer represented Bornstein, and stating that he was unable to locate Wolf, that he was afraid Wolf might not appear for trial, that petitioner and his brother had asked him to represent them and that he planned to represent them at trial (App. 13).

On the day the trial commenced, October 5, 1970, the case of petitioner's brother, Edward Alexander, was severed (App. 24).[2] Mr. Fahringer and Mr. Milavetz appeared as co-counsel for petitioner (App. 14, 22). A different attorney represented defendant Bornstein (App. 22). Paul Wolf failed to appear (App. 23-24). As the district court ruled (Pet. 11), the files and records demonstrate that Mr. Fahringer did not represent petitioner in any real sense until he had ceased to represent other defendants.

The claim of divided loyalty to defendants who were not on trial is an afterthought. None of the facts of Mr. Fahringer's past representation was in any way hidden. Moreover, petitioner was represented at trial not only by Mr. Fahringer but also by Mr. Milavetz, who represented him on appeal and in these proceedings, both counsel of his own choosing. Mr. Milavetz is not alleged to have represented any other party prior to or at trial. Petitioner thus always had the services of an attorney with no possible conflict of inter-

[2] The indictment against Edward Alexander was subsequently dismissed.

est—one who could have acted to protect petitioner's interests had he felt that Mr. Fahringer's representation was deficient.

Petitioner also contends that the prosecutor acted wrongfully in having the case of petitioner's brother severed, arguing that this concealed the inability of a crucial witness to distinguish petitioner from his brother. There is nothing in the record to support a claim of improper prosecutorial motive and no deception was involved, since the grand jury testimony in which Bruce Valentine, the principal witness, had difficulty making a positive identification between the two brothers was turned over to petitioner's counsel and used by Mr. Fahringer in cross-examination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

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